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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA, Plaintiff, vs. JOSEPH DOUGLAS ROBERTS, Defendant.	CR 2010-00047 STATE'S MOTION TO RECONSIDER DISMISSAL (Honorable Donna J. Grimsley)

The State of Arizona, by undersigned counsel, respectfully requests this Court to reconsider the January 18, 2011, ruling dismissing the charges in this case with prejudice. Pursuant to Rule 16.6(d), Arizona Rules of Criminal Procedure, dismissal of a prosecution shall be without prejudice unless the court finds that the interests of justice require dismissal with prejudice.

The dismissal with prejudice in this case fails to account for the interests of the victims' need for justice. The Court should reconsider the dismissal with prejudice in order to account for these interests. Further, the interests of justice demand that the Ruling be reconsidered because

of new evidence obtained by the State.

This Court retains jurisdiction over this issue. *State v. Johnson*, 113 Ariz. 506, 557 P.2d 1063 (Ariz. 1976).

This Motion is supported by the attached Memorandum of Points and Authorities.

Submitted March 14, 2011.

WILLIAM G. MONTGOMERY
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BY /s/ John F. Beatty
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MEMORANDUM OF POINTS AND AUTHORITIES

A. Prima Facie Case

Pursuant to defendant's motion to dismiss, filed February 26, 2010, the Court received evidence and testimony and heard argument on September 27, 2010, November 10, 2010, and December 3, 2010, and issued a ruling on January 18, 2011, that resulted in a dismissal of the case with prejudice. In order for the defendant to establish a *prima facie* case and succeed in his claim, the defendant had to show that there was a violation of his rights by the alleged acts of the State. *See*, Rule 16.2(b), Ariz.R.Crim.Proc., and *State v. Mieg*, 225 Ariz. 445, 239 P.3d 1258 (Ariz.App. 2010). Further, the Court had to then find that the violation caused prejudice to the defendant, and that the violation caused the defendant to lose confidence in all lawyers. *See*, *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009); *U.S. v. Morrison*, 449 U.S. 361, 101 S.Ct. 665 (1981).

When he testified on November 10, 2010, the defendant made statements to the effect

that the jail visit of February 4 caused him to mistrust his lawyer and all other potential lawyers. These statements mirrored comments from the Court during the hearing on September 27, 2010, regarding what was necessary to grant the relief requested. The Court relied on the defendant's statements when deciding this issue, as set forth in the January 18, 2011, ruling. However, evidence subsequently obtained by the State reveals the defendant deliberately misled the Court in a calculated effort to accomplish a dismissal of the case. Furthermore, since the defendant had not claimed prior to the hearings that he had no confidence in attorneys, the State was unaware of the need to seek evidence to rebut the defendant's claims, which again mirrored what the Court relayed during the hearing of September 27, 2010.

B. Jail Calls

The evidence that the State has recently obtained consists of recordings of the defendant's jail calls. None of the recordings received by undersigned counsel included legal calls; the calls were made by the defendant to family and/or friends. There are easily over 250 recordings, many of which are 15 minutes long. The review of the voluminous calls is still on-going, but they are obviously replete with statements by the defendant regarding his continuing trust of his attorney and admiration for the work his attorney was doing. These statements show that he lied and misled the Court when he testified in the evidentiary hearing. The recordings also clearly show that he knew and was fully aware of what he needed to say to the Court in an effort to secure a favorable ruling and to get a dismissal of the charges. Furthermore, they clearly demonstrate the continuing relationship between the defendant and his attorney.

Of particular note when considering the evidence from the jail tapes is the Court's factual findings regarding the defendant's testimony and the avowals of defense counsel that provided the Court with a basis for its ruling. *See*, Court Order entered January 18, 2011, at p. 2. When

comparing the testimony and avowals with the defendant's actual frame of mind as clearly demonstrated in the jail tapes, it is evident that the Court did not have true information to rely upon in making the necessary determinations to support the ruling entered.

The jail calls described below are a sampling of the entire jail-call recordings. Transcripts have not been prepared for the calls, so the descriptions below are paraphrases. At times, the defendant used vulgar language, and therefore when that language is used, those phrases will be quoted.

The defendant was taken into custody at the end of September 2009. There were no recordings for September or October 2009. Starting with the calls in November 2009, which was about three months prior to the jail visit and preliminary hearing, the defendant immediately started complaining about his lawyer. This is important because it illustrates, *prior to* the February 4 jail visit, his prevailing attitude toward his lawyer and toward all lawyers which then changed to a positive attitude leading up to the hearing of November 10, 2010.

On November 16, 2009, he says he has not talked to his "piece of shit" lawyer in two and a half weeks.

On November 20, he says "My lawyer's not fighting for me, he's never going to; I don't have any other options for a 'fucking' lawyer." Soon after this statement, the woman he is talking to says he has a right to get another lawyer, to which he responds that he is not going to ask for another lawyer because his attorney is "going to do at least a little more than anyone else would." He expresses his thought that all of the lawyers on the list of available lawyers are related to the County Attorney in some way.

On December 13, he expresses that he feels his lawyer is not on his side, and he complains about his lawyer.

On December 18, he wants to change his lawyer.

On December 30, he says he needs a new lawyer but there isn't one for him.

On January 27, 2010, he says he spoke to his lawyer and scheduled an appointment.

On February 1, he says he talked to his lawyer who gave him bad news. He said his lawyer told him the plea deal from the County Attorney was "25 years." He also says that his attorney is not going to do anything. He later says that the County Attorney sent over a deal saying that he'll get 25 years if he waives the preliminary hearing. He says he told his lawyer to go "fuck himself." When talking about the defendant's video-taped confession, he tells the woman he was talking to that he did *not* say the taped confession was a lie. He also says that the State "does not have to prove shit since I told them everything I did." He says his attorney told him there was only a "2% chance of winning" this case if the defendant went into court and told the jury he was not telling the truth when he talked to the police. Then he says "That's exactly what I'm going to do because during the interview I told them exactly what they wanted to hear." Later, he says that even if he loses after trial he "is getting 25 to life, so what's the point in taking 25 'fucking' years when that is what I am already going to get." He says his attorney told him the jury will not believe him if he tells the jury that he lied when he talked to the cops.

On February 2, he says he spent the night in the law library and so now he is going to "hit" his lawyer. He says that "they are trying to get him to plead down to first degree murder and stealing a car, 25 years in prison." Importantly, this is nearly identical to what Investigator Hounshell told him was the plea offer two days later. He later says his attorney asked him if he wanted to make a counter offer for something less than 19 years. He calls his lawyer a "stupid fucker" and he says he threw the paper at the attorney and told him to "shove that paper up Michael Whiting's asshole." Michael Whiting was the elected Apache County Attorney at the

time of the call, and he still is. The defendant says he can't get a different lawyer because there are no other lawyers. He says his lawyer, whom he identifies by the name of David Martin, is "pro bono on this case and that's why he's being a complete lazy douche-bag." He again expresses how this lawyer is bad, just like all other lawyers, but none would be better for him. He says it is common knowledge in the jail among the inmates that all of the court-appointed lawyers will try to get an inmate to plead because they "don't want to have to 'fucking fight'." He ends the call saying that "tomorrow morning I am going to give him everything I found in the library and my testimony and I am going to shove it down his throat."

On February 3, he said his lawyer came again to visit with him, and he told his lawyer to "shove all the plea bargains up his ass." He says his lawyer told him that if he does not take a deal, the State will try to scare them with the death penalty. Importantly, this statement regarding being threatened with the death penalty *predated* Hounshell's visit by only one day and actually served to prepare the defendant for Hounshell's statements as to the plea offer and to the consequences if the plea were not accepted.

As the Court is aware, Investigators Hounshell and Jaramillo visited the defendant in jail on February 4, 2010.

On February 4, *after* the investigators visit the defendant in jail, the defendant says that he thinks he is making the State sweat and the State is trying to turn it back on him because they're scared and his lawyer has actually "been coming up with some pretty good shit lately." Further, the defendant states, "I'm not going to fire him after all." He praises his lawyer and says his lawyer said that a lot of what the defendant gave the lawyer was helpful, and some was not, but either way he can work with it.

As the Court is aware, the preliminary hearing started on February 5, 2010. On that date,

after the hearing, the defendant made another call in which he again praised the work of his lawyer and talked of the cooperation between the lawyer and the defendant. He said his lawyer "tore the State's ass apart" and made the State "look like a dumbass" and "we're getting somewhere now" and "all in all he is alright today" and the defendant is not going to fire the lawyer after all.

On February 7, and February 9, the defendant again praised the work of his lawyer, characterizing his attorney's performance as "he stomped on them pretty good" and "my lawyer jumped on his throat."

The statements in the calls continue in this vein, talking of cooperation with his lawyer.

The pre-evidentiary hearing was on September 27, 2010. The defendant was present, and the parties and the Court addressed the issue of what was required for a *prima facie* case. Prior to this date, the jail calls do not appear to reflect that the defendant said that he mistrusted all lawyers as a result of the February 4 jail visit. As stated above, not all calls have yet been reviewed.

However, on October 11, two weeks after the September 27 hearing, the defendant talked to a woman on the telephone and described to her the purpose of the next hearing. He says that "that's what this entire next hearing is about ... whether or not [Hounshell's actions] impacted the case badly enough that [the Judge] either has to get me a new attorney or whether or not my confidence in attorneys would be shattered enough that she wouldn't be able to do that, in which case a dismissal would be the most reasonable and sound decision to make." Not surprisingly, four weeks later he testified under oath, effectively, that his confidence in all attorneys is shattered. He also talks about multiple discussions he has had with the lawyer and about a possible insanity plea. He also says that his lawyer is treating him this way because the lawyer

has other clients "who are paying clients, unlike me."

The evidentiary hearing was then held on November 10, 2010. After the hearing, he spoke to a woman and made several statements about the hearing, often referring to "his" lawyer and saying that his lawyer "called the cop" who arrested his wife. He described the experience with phrases like "we ripped them a pretty good asshole today," and "we'll see how bad that rip will be," and "my lawyer is coming back to go over some shit," and "according to my lawyer, I did very well."

On November 18, he cooperated with his lawyer when they talked to the State Bar regarding Michael Whiting of the Apache County Attorney's Office.

On December 2, he refers to talking to his lawyer on the phone and awaiting paperwork from him.

On December 5, he talks of how he and his lawyer are ready to file a Motion for Change of Judge.

On December 8, he talks about how he has cooperated with his lawyer. Also, he describes his lawyer's perceptions on the performance of undersigned counsel at the closing arguments.

C. Victims' Rights

Pursuant to the Arizona Constitution, Article 2, §2.1(A), crime victims in Arizona have a right to justice and due process. Additionally, victims have a right "[t]o have all rules governing criminal procedure . . . protect victims' rights." Ariz. Con. Article 2, §2.1(A) (11). Accordingly, when considering whether a dismissal of charges with prejudice serves the interests of justice, *see* 16.6(d), Ariz. R. Crim. Pro., the crime victim's right to justice must also be considered. The State is confident that, upon reconsideration, the Court will give all interests involved, including

the crime victims', due weight and determine that a dismissal with prejudice is not in the interests of justice.

D. Other Issues

The State previously argued several points during this litigation that the Court does not seem to have addressed in the January 18 Ruling. The Court should reconsider the Ruling in order to address these issues. During the litigation of this matter, the State previously filed several documents describing each of the issues. To avoid unnecessary repetition, the State incorporates herein by reference the State's Response to Defendant's Motion to Dismiss, the State's Memorandum Re Hearing on Motion to Remand, and the State's Response to Defendant's Motion for Review of Preliminary Hearing. Briefly, the issues raised by the State are found in four separate areas.

First, regarding the existence of a violation, the State argued there is a distinction in the law between an intrusion and a violation. The State has argued that the intrusion was not a violation of the defendant's 6th Amendment Rights. This argument is based in part on the fact that the hearing should not have been structured and styled after the case of *State v. Warner*, 150 Ariz. 123, 722 P.2d 291 (1986), and certainly the standards found in *Warner* should not have applied to this case. *Warner* was not appropriate as the basis for the hearing because that case was factually and legally distinct from the case at bar. The State argued that the recent case of *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009), was more clearly on point factually and legally than *Warner*. This Court did not address these arguments in the Ruling.

Second, regarding a *prima facie* case, the State argued that the defendant was required to make a *prima facie* case before the Court could begin to try to find a remedy for the acts of the State's investigators. The State cited to the recent case of *State v. Mieg*, 225 Ariz. 445, 239 P.3d

1258 (Ariz.App. 2010), which overturned a lower court decision after proceeding without the defense having made a *prima facie* case. The State argued throughout the litigation that the defendant had not established such a preliminary case. At the September 27 hearing, the parties and the Court engaged in a lively discussion about the issue of a *prima facie* case, saying specifically that the defendant would first be required to show he had lost confidence in all attorneys *because of* the actions of the investigators. At the following hearing, the defendant conveniently came armed with this information (as cited above in the October 11, 2010, telephone call) and he told the Court exactly what he thought needed to be said. This testimony undermined the Court's ability to fairly evaluate the true state of the relationship between the defendant and his attorney, let alone the defendant's true disposition towards attorneys in general.

Third, even without the jail tapes, the State previously argued that the defendant was not a trustworthy witness. The Court did not address the issue of the defendant's trustworthiness in the Ruling. With the jail calls, we know now that the defendant lied to the Court. The defendant is willing to say whatever it takes while in Court, as he said he did when he was in his original police interview (he said as much in the February 1, 2010, call, described above). Further, his calls are overflowing with comments about his attorney's work, reflecting his true mindset as described above. But the October 11 call shows that he knew what was at stake and what he needed to say, which he then parroted back to the Court at the next opportunity. The calls do not reflect a change in the defendant from before to after the jail visit regarding his feelings toward his lawyer or any other lawyer. It is that change that would begin to form an appropriate basis for a *prima facie* case.

Fourth, regarding the appropriate remedy, the State argued that the remedy in the *Warner*

case was based on the U.S. Supreme Court case of *U.S. v. Morrison*, 449 U.S. 361 (1981). The *Morrison* Court directs lower courts to impose a remedy appropriate for the circumstances. The State provided several cases as examples of appropriate remedies for acts more egregious than what occurred in case at bar. This Court's ruling does not address why the dismissal in this case, with prejudice, fits within the legal framework of an appropriate remedy. That framework clearly indicates that the appropriate remedy is to suppress the existence and content of the February 4 visit. Because the Ruling does not address this issue and the other issues set forth above, the Court should reconsider the Ruling to reflect consideration of all the issues attendant to the murder case before it.

E. Arguments

By any reading of the case law on the issue of defendant's relationship with his attorney, as described in earlier pleadings, the fact that there was an intrusion into the attorney-client relationship is merely a threshold question. The next question has to be the establishment of a *prima facie* case by showing that the intrusion was an actual violation of the defendant's rights. Only at that point can the Court contemplate whether to impose a remedy, and then that remedy must be appropriate to the circumstances.

Regarding the intrusion, the Court's Ruling set forth a factual finding of an intrusion into the defendant's 6th Amendment Rights. That intrusion is based on the jail visit on February 4. That visit was recorded, and the Court has heard the recording. During the entire encounter with the investigators, the defendant does not make any statements that would tend to incriminate him. However, even though there is nothing of consequence that is suppressible from that February 4 contact, case law is clear that the most severe appropriate remedy in a situation like this is to suppress the existence and content of the contact. Whether or not the contact reaped

any information does not change the fact that case law instructs us that suppression is the appropriate remedy, not dismissal with prejudice.

Regarding a violation however, the Court did not address the fact that the defendant failed to make a *prima facie* case, certainly not until he had over a year to research the legal issues, talk with his lawyer and review the evidence and he had learned in Court what he needed to say in order to achieve a dismissal. The telephone records the State has recently obtained provide crucial evidence to show the Court that the defendant's negative feelings about lawyers and the criminal justice system existed months before the jail visit by the officers. The records also show that the defendant's feelings towards his lawyer actually improved as he reaped benefits from his attorney's representation. Quite simply, the defendant lied to the Court when he testified that the acts of the officers on February 4 caused him to mistrust all lawyers. The Court should reconsider the Ruling based on this important evidence and on the fact that the defendant deliberately misled this Court to obtain a favorable ruling.

Finally, the remedy handed down by the Court is deserving of review and adjustment. Dismissal with prejudice is the most extreme remedy possible in a criminal case. Given the facts and circumstances of the underlying criminal offense, dismissal with prejudice works to deny the surviving family members of the homicide victims any recourse for justice. The defendant was in regular contact with his lawyer. He was prepared prior to the officers' visit for the consequences of not taking a plea deal, including the possibility of the death penalty. His lawyer told him virtually what the plea deal was. He continued to work with and praise his lawyer even after the February 4 visit. He parroted back to the Court exactly what was discussed in open court to ensure he said the right phrases. For these reasons, the Ruling should be reconsidered so that the surviving members of the homicide victims are not deprived of any recourse for justice.

F. Conclusion

The Court should reconsider this Ruling in light of the good cause discovered in the jail calls and to address the various issues noted above.

Submitted March 14, 2011.

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ORIGINAL mailed/delivered
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